Nasaruddin bin Daud & Anor v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS W-05–3 OF 2005 AND W-05–4 OF 2005
SURIYADI, HASAN LAH AND AHMAD MAAROP JJCA
17 MAY 2010

Criminal Procedure — Appeal — Grounds of — Application for leave to adduce additional ground of appeal — Reasons for application stated to be in counsel's affidavit in support — Additional ground of appeal referring to alleged failure of prosecution's witnesses to give evidence on oath at trial proper — Counsel not appearing as defence counsel at trial proper — Whether counsel in position to know what actually transpired at trial — Whether application ought to be allowed

Criminal Procedure — Police investigation — Police officer's diary — Police officer refreshing memory with investigation diary out of court and prior to trial — Whether accused entitled to call for and/or inspect entries in diary — Whether entries was statement made in course of police investigations and ordinarily not admissible — Evidence Act 1950 s 159 — Criminal Procedure Code s 119(2)

Evidence — Agent provocateur — Not unworthy of credit — Agent provocateur in drug trafficking case — Whether protected under s 40A(1), (2) of the Dangerous Drugs Act 1952 — Whether evidence of agent provocateur admissible — Whether evidence of agent provocateur requiring corroboration — Dangerous Drugs Act 1952 s 40A(1) &(2)

Evidence — Notes of evidence — Judge's notes — Trial judge finding prima facie case established and calling upon accused persons to enter defence — Trial judge failing to record finding in notes of proceedings — Whether mandatory for trial judge to record findings in notes of proceedings

Evidence — Refreshing memory — Witness refreshing memory out of court — Police officer refreshing memory with investigation diary out of court and prior to trial — Whether accused entitled to call for and/or inspect entries in diary — Whether entries was statement made in course of police investigations and ordinarily not admissible — Evidence Act 1950 s 159 — Criminal Procedure Code s 119(2)

Both the appellants were arrested by the police when they were delivering 1,916.90g of cannabis to PW4, an agent provocateur who had agreed to buy

the cannabis after holding negotiations with the appellants. The appellants were subsequently convicted in the High Court for trafficking in dangerous drugs in furtherance of their common intention, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and punishable under s 39B(2) of the DDA, read with s 34 of the Penal Code ('Code'). The appellants appealed to the Court of Appeal. The first appellant applied by way of notice of motion (encl 22a) to the Court of Appeal for leave to rely on an additional ground of appeal, which ground was not pleaded in his petition of appeal. The additional ground concerned the first appellant's complaint that the prosecution witnesses had not given evidence on oath at the trial. The grounds of the application for leave were stated in encl 22a to be as set out in the affidavit of the first appellant's counsel (encl 22b). In the appeal proper, counsel for the first appellant complained that the trial judge had failed to comply with s 180 of the Criminal Procedure Code ('CPC'). Counsel submitted that the judge had failed to record in the notes of proceedings that the prosecution had established a prima facie case and the first appellant ought to be ordered to enter on his defence. Counsel for the second appellant attacked PW4's evidence and submitted that the trial judge had failed to scrutinise PW4's evidence.

Held, dismissing the first appellant's application and both appeals:

(1) Enclosure 22b did not set out the grounds of the application as stated in encl 22a. Enclosure 22b merely repeated the additional ground of appeal in respect of which leave was sought by the first appellant. Counsel for the first appellant did not appear for either the first or second appellant at the trial in the High Court. He was thus not in a position to state what actually transpired at the trial and to especially state whether the prosecution witnesses did or did not give evidence on oath. However, the prosecution's evidence adduced from the interpreter at the trial and the first instance deputy public prosecutor, clearly confirmed that all the witnesses, including the prosecution witnesses and both appellants, had given their evidence under oath. There was thus no merit in encl 22a and it ought to be dismissed (see paras 4–6).

(2) PW4, an agent provocateur was protected by s 40A(1) and (2) of the DDA in that he was not presumed to be unworthy of credit, and his evidence relating to any attempt to abet or abetment of the offence if done for the purpose of securing evidence against an accused person, was admissible. Any statement made to him by an accused person was also admissible at the trial. Although there was no requirement for his evidence to be corroborated, the trial judge had found PW4's evidence to be corroborated by PW9's evidence in material particulars. She had considered all the challenges to his evidence before properly finding his (PW4's) evidence to be credible and unshaken (see paras 14 & 16); *(1)*

Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor [1987] 2 MLJ 336 (SC) referred.

(3) Although PW4 had referred to his investigation diary ('ID') for the purpose of refreshing his memory, he had done so before the trial and not whilst giving evidence in the trial pursuant to s 159(1) and (2) of the Evidence Act 1950 ('EA'). Thus, pursuant to s 119(2) of the CPC, both the appellants were not entitled to call for or inspect the ID. The contents of the ID did in fact constitute a statement made by PW4 in the course of police investigations and therefore inadmissible except for the purpose provided under s 159 of the EA (see paras 14–15); *Gun Kim Luu v Public Prosecutor* [1961] MLJ 35 referred; *Public Prosecutor v Er Ah Kiat* [1966] 1 MLJ 9 referred.

(4) After having undertaken a maximum evaluation of the evidence of PW4 and PW9, the trial judge had properly concluded that the prosecution had established a prima facie case of trafficking against both the appellants under s 2 of the DDA in furtherance of their common intention under s 34 of the Code (see para 18).

(5) The trial judge had clearly considered whether the prosecution had made out a prima facie case against both the appellants. Her failure to record in the notes of the proceedings her finding that the prosecution had made out a prima facie case against both the appellants and her order calling upon them to enter on their defence was not fatal to the prosecution. There is nothing under s 180 of the CPC or under any other statute making it mandatory for the trial judge to record in the notes of proceedings the trial judge's finding that the prosecution had proven a prima facie case and the judge's order calling upon the accused to enter on his defence (see paras 22–23); *Yap Chai Chai & Anor v Public Prosecutor* [1973] 1 MLJ 219 referred; *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217 (SC) referred; *Public Prosecutor v Chan Wai Heng* [2008] 5 MLJ 798 referred.

(6) The trial judge's finding that the defence of both the appellants was one of denial was based upon a finding of facts dependent on the credibility of the witnesses, against which the Court of Appeal was reluctant to interfere with. There was no misdirection or appealable error by the trial judge. The conviction and sentences on both appellants was safe. Their appeals ought to be dismissed. Convictions and sentences imposed affirmed (see paras 28–29); *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644 referred; *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 referred.

[Bahasa Malaysia summary

Kedua-dua perayu ditangkap oleh polis apabila mereka sedang menghantar 1,916.90g kanabis kepada PW4, seorang ejen perangkap yang bersetuju

membeli kanabis selepas membuat tawar-menawar dengan perayu-perayu. Perayu-perayu kemudian disabitkan di Mahkamah Tinggi untuk pengedaran dadah berbahaya di dalam lanjutan niat bersama, suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan boleh dihukum di bawah s 39B(2) ADB, dibaca bersama s 34 Kanun Keseksaan ('Kanun'). Perayu-perayu merayu ke Mahkamah Rayuan. Perayu pertama memohon melalui notis usul (lampiran 22a) kepada Mahkamah Rayuan untuk kebenaran untuk menyandar atas alasan rayuan tambahan, yang mana tidak diplidkan di dalam petisyen rayuannya. Alasan tambahan adalah berkaitan dengan aduan perayu bahawa saksi pihak pendakwaan tidak memberikan keterangan bersumpah semasa perbicaraan. Alasan-alasan bagi permohonan kebenaran dinyatakan di dalam lampiran 22a seperti yang dikemukakan di dalam afidavit peguam perayu pertama (lampiran 22b). Semasa rayuan sebenar, peguam perayu pertama mengadu bahawa hakim perbicaraan telah gagal mematuhi s 180 Kanun Prosedur Jenayah ('KPJ'). Peguam menghujah bahawa hakim telah gagal merekodkan nota prosiding bahawa pihak pendakwaan telah membuktikan kes prima facie dan perayu pertama sewajarnya diperintahkan untuk membela diri. Peguam perayu kedua membidas keterangan PW4 dan menghujah bahawa hakim perbicaraan gagal untuk meneliti keterangan PW4.

Diputuskan, menolak permohonan perayu pertama dan kedua-dua rayuan:

(1) Lampiran 22b tidak menyatakan alasan-alasan permohonan seperti yang dinyatakan di dalam lampiran 22a. Lampiran 22b hanya menyatakan semula alasan rayuan tambahan yang berkaitannya kebenaran dipohon oleh perayu pertama. Peguam perayu pertama tidak hadir bagi perayu pertama atau kedua semasa perbicaraan di Mahkamah Tinggi. Oleh itu dia tidak berada di dalam kedudukan untuk menyatakan apa yang sebenarnya berlaku semasa perbicaraan dan khususnya untuk menyatakan sama ada saksi-saksi pihak pendakwaan telah atau tidak memberikan keterangan bersumpah. Walau bagaimanapun, keterangan pihak pendakwaan yang dikemukakan daripada jurubahasa dalam perbicaraan dan timbalan pendakwa raya di mahkamah rendah, jelas mengesahkan bahawa kesemua saksi, termasuk saksi pihak pendakwaan dan kedua-dua perayu, telah memberikan keterangan bersumpah. Oleh itu tidak ada merit di dalam lampiran 22a dan ia patut ditolak (lihat perenggan 4–6).

(2) PW4, ejen perangkap adalah dilindungi oleh s 40A(1) dan (2)ADB di mana dia tidak dianggap tidak boleh dipercayai, dan keterangannya berkaitan apa-apa percubaan untuk bersubahat atau perbuatan bersubahat bagi kesalahan tersebut jika dibuat untuk tujuan mendapatkan keterangan terhadap seseorang tertuduh, boleh diterima. Apa-apa kenyataan yang dibuat kepadanya oleh seseorang tertuduh juga boleh diterima di dalam perbicaraan. Walaupun tiada keperluan untuk sokongan bagi keterangannya, hakim perbicaraan mendapati keterangan

PW4 disokong oleh keterangan PW9 secara terperinci. Dia telah mempertimbangkan kesemua cabaran bagi keterangannya sebelum membuat dapatan wajar bahawa keterangannya (PW4) boleh dipercayai dan tidak tergugat (lihat perenggan 14 & 16); *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 (MA) dirujuk.

(3) Walaupun PW4 telah merujuk kepada diari penyiasatannya ('ID') bagi tujuan mengingat semula, dia berbuat demikian sebelum perbicaraan dan bukan semasa sedang memberikan keterangan dalam perbicaraan menurut s 159(1) dan (2) Akta Keterangan 1950 ('Akta'). Oleh itu, menurut s 119(2) KPJ kedua-dua perayu tidak berhak untuk memanggil untuk dan memeriksa ID. Kandungan ID sememangnya adalah kenyataan yang dibuat oleh PW4 semasa penyiasatan polis dan oleh itu boleh diterima kecuali untuk tujuan yang diperuntukkan di bawah s 159 Akta (lihat perenggan 14–15); *Gun Kim Luu v Public Prosecutor* [1961] MLJ 35 dirujuk; *Public Prosecutor v Er Ah Kiat* [1966] 1 MLJ 9 dirujuk.

(4) Selepas membuat pemeriksaan maksimum keterangan PW4 dan PW9, hakim bicara telah secara wajar memutuskan bahawa pihak pendakwaan telah membuktikan kes prima facie pengedaran terhadap kedua-dua perayu, di bawah s 2 ADB dalam lanjutan niat bersama di bawah s 34 Kanun (lihat perenggan 18).

(5) Hakim bicara telah dengan jelas mempertimbangkan sama ada pihak pendakwaan telah membuktikan kes prima facie terhadap kedua-dua perayu. Kegagalannya merekodkan di dalam nota prosiding penemuannya bahawa pihak pendakwaan telah membuktikan kes prima facie terhadap kedua-dua perayu dan memerintahkan mereka membela diri tidak menjejaskan kes pihak pendakwaan. Tidak ada apa-apa di bawah s 180 KPJ atau di bawah mana-mana statut yang menjadikan mandatori, bagi hakim perbicaraan merekodkan di dalam nota prosiding penemuan hakim perbicaraan bahawa pihak pendakwaan telah membuktikan kes prima facie dan perintah hakim untuk tertuduh membela diri (lihat perenggan 22–23); *Yap Chai Chai & Anor v Public Prosecutor* [1973] 1 MLJ 219 dirujuk; *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217 (MA) dirujuk; *Public Prosecutor v Chan Wai Heng* [2008] 5 MLJ 798 dirujuk.

(6) Penemuan hakim perbicaraan bahawa pembelaan kedua-dua perayu adalah penafian adalah berdasarkan kepada penemuan fakta yang bergantung pada kredibiliti saksi-saksi, yang terhadapnya Mahkamah Rayuan tidak mahu campur tangan. Tidak terdapat salah arahan atau kesilapan yang boleh dirayu oleh hakim bicara. Sabitan dan hukuman kedua-dua perayu adalah selamat. Rayuan-rayuan mereka mesti ditolak. Sabitan dan hukuman yang dikenakan disahkan (lihat perenggan

28–29); *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644 dirujuk; *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 dirujuk.]

Notes

For a case on an agent provocateur not unworthy of credit, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 317.

For a case on judge's notes, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 1974.

For a case on police officer's diary, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 2773.

For cases on grounds of appeal, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 488–505.

For cases on witness refreshing memory out of court, see 7(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2355–2357.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336, SC (refd)

Andy bin Bagindah v PP [2000] 3 MLJ 644, CA (refd)

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)

Gun Kim Luu v PP [1961] MLJ 35 (refd)

Junaidi bin Abdullah v PP [1993] 3 MLJ 217, SC (refd)

Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560, FC (refd)

PP v Chan Wai Heng [2008] 5 MLJ 798, CA (refd)

PP v Er Ah Kiat [1966] 1 MLJ 9 (refd)

Yap Chai Chai & Anor v PP [1973] 1 MLJ 219, FC (refd)

Legislation referred to

Criminal Procedure Code ss 119, 119(2), 180
Dangerous Drugs Act 1952 ss 2, 37(da), 39B(2), 40(1), (2)
Evidence Act 1950 s 159, 159(1), (2)
Penal Code s 34

Appeal from: Criminal Trial No 45–09 of 2002 (High Court, Kuala Lumpur).

Sukhaimi bin Mashud (Teh Poh Teik & Co) for the first appellant.
K Viknesvaran (Viknes Ratna & Co) for the second appellant.
Awang Armadajaya bin Awang Mahmud (Zureen Elina bt Mohd Dom with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmad Maarop JCA:

INTRODUCTION

[1] In this case, the appellants — Nasaruddin and Azhar were arrested by the police when they were delivering 1916.90g of cannabis to the agent provocateur (Constable Aziz) which the agent provocateur agreed to buy from the appellants pursuant to a negotiation between them. The appellants were charged with trafficking of the said cannabis in furtherance of their common intention, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('ADB') and read with s 34 of the Penal Code . The High Court convicted them and sentenced them to death. They appealed to this court.

APPLICATION IN ENCL 22A

[2] Before considering the appeal proper we will consider the notice of motion in encl 22a filed by Nasaruddin. In encl 22a, Nasaruddin applied for leave to include and rely on the following additional ground of appeal which was not pleaded in his petition of appeal:

> That the convictions and the death sentences imposed on the appellants under s 39B(2) of the Dangerous Drugs Act 1952 by the High Court are totally unsafe as all the witnesses for the prosecution have not given evidence on oath at the trial.

[3] The beginning of the notes of evidence of each witnesses for the prosecution in this case contains the usual particulars about the witness such as his or her age, address or occupation. This is followed by the notes on what the witness said in examination-in-chief, cross-examination and re-examination, and if questions were asked by the courts, the notes on what the witness said in response to the questions. In other words the notes of evidence of each of the witnesses were recorded in the usual form. The only difference is that in this case except at pp 22, 57, 82 and 101 of the record of appeal, in the beginning of the evidence of each of the prosecution witnesses, there is no note to say that he or she gave evidence under oath. The usual form of 'En... mengangkat sumpah dan bercakap dalam bahasa...' followed by the language used by the witness which is usually recorded at the beginning of each witness' evidence, is missing at the beginning of the notes of evidence of each of these witnesses in the record of appeal in this case. However, at p 22 of the appeal record in respect of PW3, we find the following note — 'under same oath'. At p 57 of the appeal record, we find the following note — 'Kons Abdul Aziz — taking oath again'. At p 101 of the appeal record we find the following note — 'Witness under same oath'. We also find the following note at p 126 of the appeal record — 'Nasaruddin Daud: (under oath)'. At p 131 of the appeal record, we find the

following note — 'OKT 2: Azhar bin Nordin (under oath)'. The question is whether the prosecution witnesses did or did not give evidence under oath.

[4] According to the encl 22a, the grounds in support of the application thereof are set out in the affidavit of Encik Hisyam bin Abdullah @ Teh Poh Teik, counsel appointed to represent Nasaruddin in this appeal (encl 22b). However, we find no such grounds in encl 22b. What is stated in encl 22b is the repetition of the additional ground of appeal in respect of which leave is sought by Nasaruddin. Encik Hisyam did not appear for either Nasaruddin or Azhar in the trial in the High Court. He was therefore not in the position to say what actually happened at the trial and to say whether the prosecution witnesses did or did not give evidence under oath. As against that, in opposing the application in encl 22a, the public prosecutor filed two affidavits in reply. The first was affirmed by Sugandhi a/p K Muniyandy. The second was affirmed by Wan Shaharuddin Wan Ladin. In her affidavit, Sugandhi, the interpreter attached to the Kuala Lumpur High Court from 2001–2005 said that what was alleged in encls 22a and 22b was not true because in the trial in the High Court, all the witnesses for the prosecution gave evidence under oath. Sugandhi also stated that in the trial from 12 August 2003 until 8 September 2003, all the prosecution witnesses gave evidence under oath and that each time the trial resumed after an adjournment, the prosecution witness who was to continue giving evidence took the oath again before testifying. This is clear from paras 5 and 6 of her affidavit:

> 5. Saya sesungguhnya menyatakan bahawa pada tarikh-tarikh perbicaraan bermula 12 Ogos 2003 sehingga 8 September 2003, saksi-saksi pendakwaan berikut:
>
> (i) L/Kpl Mustapha
>
> (ii) L/Kpl Kanapathy a/l Rajoo
>
> (iii) Halimah bt Abdul Rahman
>
> (iv) Konstable Abd. Aziz b. Ahmad
>
> (v) C/Insp. Ahmad Tarmudi
>
> (vi) C/Insp. Roslan bin Omar
>
> (vii) Insp. Mohd Nazri bin Mohd Ismail
>
> (viii) Kop. Det. Yusof b. Hj. Zainuddin
>
> (ix) C/Insp. Haslah Bt. Bachok
>
> telah masing-masing mengangkat sumpah dan memberi keterangan dalam Bahasa Malaysia.
>
> 6. Saya selanjutnya menyatakan bahawa pada setiap kali sambungan

pemeriksaan (sambung bicara) dijalankan, saksi-saksi pendakwaan telah sekali lagi mengangkat sumpah dan memberi keterangan dalam Bahasa Malaysia.

[5] What was affirmed by Sugandhi as aforesaid was supported by Wan Shaharuddin. In his affidavit, Wan Shaharuddin said he was the deputy public prosecutor who conducted the prosecution of the case against Nasaruddin and Azhar in the High Court. Wan Shaharuddin stated that all the prosecution witnesses had given evidence under oath in the trial. In paras 6–13 of his affidavits, Wan Shaharuddin elaborated on the position of each of the prosecution witnesses according to the dates they gave evidence. He stated that on 12 August 2003, the first prosecution witness (L/Cpl Mustapha) and the second prosecution witness (L/Cpl Kanapathy a/l Rajo) gave evidence under oath and spoke in Bahasa Malaysia. On the same date, the third witness, Halimah bt Abdul Rahman took the oath and gave evidence in Bahasa Malaysia. She took the oath again and spoke in Bahasa Malaysia on 13 August 2003 when the trial resumed after an adjournment. In this regard Wan Shaharuddin referred to p 22 of the appeal record on which the following note was recorded — 'under same oath'. On 13 August 2003, the fourth witness constable Abdul Aziz bin Ahmad took the oath and give evidence in Bahasa Malaysia. On 14 August 2003, the fifth witness, (C/Insp Ahmad Tarmudi), the sixth witness, (C/Insp Roslan bin Omar) and the seventh witness (Insp Mohd Nazri bin Mohd Ismail) respectively took the oath and give evidence in Bahasa Malaysia. On 15 August 2003, when the fourth witness, (Constable Abd Aziz) was recalled for the continuation of cross-examination, he took the oath again and gave evidence in Bahasa Malaysia. In this regard, Wan Shaharuddin referred to p 57 of the appeal record where the following note was recorded: 'Cpl Aziz takes oath again.' On 15 May 2003, the eighth witness (D/Lpl Yusof bin Hj Zainuddin) took the oath and gave evidence in Bahasa Malaysia. In 28 August 2003, when the cross-examination on him continued, the fourth witness (Constable Abd Aziz) took the oath and gave evidence in Bahasa Malaysia. On 8 September 2003 before being re-examined, Constable Abd Aziz took the oath again and gave evidence in Bahasa Malaysia. On 8 September 2003 the ninth witness — C/Insp Haslah bt Bachok took the oath and gave evidence in Bahasa Malaysia. In this regard Wan Shaharuddin referred to p 101 of the appeal record where the following note was recorded: 'Witness under same oath.'

[6] In the light of the uncontroverted evidence in the affidavits of Sugandhi and Wan Shaharuddin who were present throughout the trial of Nasaruddin and Azhar in the High Court and upon considering the appeal record, we are satisfied that all the prosecution witnesses and indeed all the witnesses in the trial (including Nasaruddin and Azhar) had given their evidence under oath. There is therefore no merit in the application in encl 22a and we dismiss it.

[7] We were informed by learned counsel for Azhar that Azhar did not file a similar application as in encl 22a. He informed us that he was not relying on the ground sought to be relied upon by Nasaruddin. We turn to the appeal proper.

BRIEF FACTS

[8] On 15 June 2001 at about 5.30pm acting on information received from an informer regarding drug trafficking activity involving two Acheh nationals around Jalan Raja Alang in the Chow Kit area, Insp Haslah bt Bachok ('PW9') instructed Constable Abd Aziz bin Ahmad ('PW4') to act as an agent provocateur posing as a dangerous drugs trafficker. At about 6pm, PW4 met the informer. At that meeting PW4 learned from the informer that the proposed sale of the drug would take place at a Minang restaurant in Chow Kit ('the restaurant'). PW4 relayed the information to PW9. PW9 told PW4 to meet her. At about 6.30pm on the same date, PW4 met PW9 in her office. PW9 gave him RM3,000 as 'flash roll'— the money to be shown to the suspected drug sellers to convince them of PW4's genuineness as a dangerous drug trafficker as well as his ability to pay for the drugs. Thereafter, PW4 proceeded to the restaurant on a motorcycle and arrived in front of the restaurant at about 7.45pm. At the restaurant, PW4 met the informer. At about 8pm on the same date, the informer introduced PW4 to two Acheh nationals — namely Din and Bob. Din was wearing a white shirt and he was the taller of the two. Bob was shorter and he was wearing a black shirt. Din was identified in court as Azhar ('the second appellant'). Bob was identified in court as Nasaruddin ('the first appellant'). Din introduced Bob to PW4 as his friend. Din told PW4, 'kau jangan takut ini orang aku juga'. After introducing Din and Bob to PW4, the informer left the restaurant. Din then invited PW4 into the restaurant to talk. In the restaurant, PW4 sat in front of Din. Bob sat beside Din. Din ordered food and PW4 ordered a drink. Bob did not order anything.

[9] After the food and drink were served, PW4 told Din that he was from Kuantan and he wanted to buy 3kg of 'daun':

> Abang aku orang baru di sini. Aku datang dari Kuantan. Sekarang aku punya *stock* daun sudah kurang. *Customer* aku sedang tunggu aku di sana. Aku kena balik cepat. Aku mahu angkat 3 kilo daun. Dulu aku pernah *deal* 1 kali di sini. Tapi itu hari aku sudah kena tipu. Aku harap abang jujur. Abang boleh bagi itu *stock* daun atau tidak. Berapa harga abang boleh kasi sama aku.

In response, Din told PW4 not to worry as he (Din) was selling the 'daun' cheap to PW4 at RM1,000 per kg. Din assured PW4 that the 'barang' was good. However, Din said he only had 2kg and 200 packets. Din told PW4 to

try first and that if they were okay PW4 could meet Din again for other deal. Din then asked PW4 whether he agreed. Din also asked PW4 to show his money:

> Engkau jangan susah tentang itu daun, itu daun aku jual murah sama engkau 1 kilo 1 ribu ringgit. Ini barang, barang baik. Tapi aku tak ada stock yang kau minta. Aku cuma ada 2 kilo dan 200 *packet* sahaja. Kalau boleh cuba dulu. Kalau *OK* kau boleh jumpa aku untuk urusan lain. Setuju, mana duit engkau boleh kasi tunjuk.

PW4 opened his waist pouch and showed Din the money. When Din saw the money, he nodded his head. Din then spoke to Bob in a language which PW4 did not understand, whereupon Bob got up and left the restaurant. PW4 and Din then finished their food and drink, after which Din invited PW4 to proceed to a spot by the side of the road outside the restaurant to wait for the 'barang' to arrive. After waiting by the road side for about 10–15 minutes, PW4 saw Bob approaching the place where he (PW4) and Din were waiting. PW4 saw Bob carrying a white plastic bag. Din told PW4 that the 'barang' have arrived and told Bob to show the 'barang' to PW4: 'Itu barang sudah sampai. Hei Bob tunjuk itu barang dia.' Upon PW4 being shown the contents of the plastic bag, Din asked PW4 for the money. Din said, 'Kau boleh kira satu-satu kemudian. Aku tak tipu. Sekarang aku mahu wang aku'.

[10] After looking into the plastic bag and upon being satisfied that the contents of the plastic bag were ganja, PW4 rubbed his head as a signal to PW9. On seeing that pre-arranged signal, PW9 and the police strike team who were waiting in ambush in and around the restaurant sprang into action. PW9 approached Din and Bob. At the distance of about 2–3 feet from them, PW9 identified herself as a police officer. Din and Bob were momentarily stunned and then tried to run away. PW9 and PW4 managed to overpower and arrest Bob after a struggle of about 2–3 minutes. When he was arrested Bob was still holding the white plastic bag in his hand. PW9 seized the plastic bag. Din who was arrested by other members of the police strike team was taken to PW9. In the presence of Din and Bob, PW9 examined the plastic bag and found in it two slabs suspected to be cannabis. In addition, PW9 also found in the plastic bag, 20 bundles each containing ten packets. Each of 200 packets contained substance suspected to be cannabis.

[11] Later, the two slabs and 200 packets containing substance suspected to be cannabis were examined and analysed by the government chemist, Halimah bt Abdul Rahman ('PW3') who confirmed them to contain 1916.9g of cannabis, a dangerous drugs under the DDA.

SUBMISSIONS

[12] Before us, with the dismissal of the application in encl 22a, in his

submission, learned counsel for Nasaruddin relied only on one ground — non-compliance by the learned trial judge of s 180 of the Criminal Procedure Code. The thrust of his submission was that nowhere in record of the proceedings of the High Court (particularly pp 125–126 of the appeal record) was it shown that the learned trial judge had concluded that the prosecution had made out a prima facie case. It was also not recorded therein that the learned judge had ordered Nasaruddin to enter on his defence.

[13] As for Azhar, in pleading that the conviction against him to be set aside, his learned counsel attacked PW4's evidence and submitted that the learned trial judge erred where he failed to scrutinise the evidence of PW4.

DECISION

[14] We will first deal with the submission of learned counsel for Azhar. The issue raised by that submission is whether the learned trial judge had failed to judicially appreciate the evidence of PW4. PW4 was an agent provocateur. The law on the position of an agent provocateur and his evidence is settled. He is protected by the provision of s 40(1) and (2) of the DDA in that he is not presumed to be unworthy of credit, and his evidence relating to any attempt to abet or abetment of the offence if done for the purpose of securing evidence against an accused person, is admissible. Similarly, any statement made to him by an accused person shall be admissible at the trial. There is no requirement for his evidence to be corroborated (see *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 at p 343 (SC)). From her judgment we find that the learned trial judge had directed herself correctly on the law which we have stated. Through his counsel, Azhar challenged the evidence of PW4 as being ridiculous (*karut*) and untrue, and that the whole of that evidence was PW4's own invention. This is evident from the cross-examination of PW4. Following through on the aforesaid challenge, it was put to PW4 that Azhar and Nasaruddin were framed. It was put to PW4 that Nasaruddin and Azhar were arrested in the restaurant without any reason. It was put to PW4 that the plastic bag was not in the possession of Nasaruddin and Azhar, and that Nasaruddin only had a sling bag when he was arrested. It was also put to PW4 that the plastic bag containing the proscribed drug was not carried by Bob (Nasaruddin) when he was arrested. It was put to PW4 that he was lying in court. In our view all these challenges were foremost in the mind of the learned trial judge when she considered whether PW4's evidence was credible. In the course of challenging PW4's evidence in the court below, learned counsel acting for Azhar also asked for PW4's investigation diary ('ID') to be produced in court. This was disallowed by the learned trial judge. Having regard to the evidence of PW4, we hold that she did not err in making the said ruling. According to PW4, he made notes on the arrest of Nasaruddin and Azhar in the ID when he returned to his office after the arrest but the notes were

incomplete. The contents of the ID was not in evidence before the court. What was in evidence was PW4's testimony in court. Although he had referred to the ID for the purpose of refreshing his memory before the trial, PW4 had not referred to it while giving evidence in court pursuant to s 159(1) and (2) of the Evidence Act 1950. Section 159 of the Evidence Act 1950 provides:

> (1) A witness may *while under examination* refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory.
>
> (2) The witness may also refer to any such writing made by any other person and read by the witness within the time aforesaid, if, when he read it, he knew it to be correct.

Section 119 of the CPC in turn provides:

> (1) Every police officer making a police investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary setting forth —
>
> (a) the time at which the order, if any, for investigation reached him;
>
> (b) the time at which he began and closed the investigation;
>
> (c) the place or places visited by him; and
>
> (d) a statement of the circumstances ascertained through his investigation.
>
> (2) Notwithstanding anything contained in the Evidence Act 1950 *an accused person shall not be entitled, either before or in the course of any inquiry or trial, to call for or inspect any such diary:*
>
> *Provided that if the police officer who has made the investigation refers to the diary for the purposes of* Section 159 or 160 of that Act, such entries only as the officer has referred to shall be shown to the accused, and the Court shall at the request of the officer cause any other entries to be concealed from view or obliterated.

[15] Since PW4 did not refer to the ID to refresh his memory while giving evidence, by virtue of s 119(2) of the CPC, the accused persons (Azhar and Nasaruddin) were not entitled to call for or inspect the ID. Indeed the contents of the ID which were entered by PW4 after the arrest of Nasaruddin and Azhar, was in fact statement made by PW4 in the course of police investigation and was therefore inadmissible in evidence except for the purpose provided under s 159 of the Evidence Act 1950 (see *Gun Kim Luu v Public Prosecutor* [1961] MLJ 35, *Public Prosecutor v Er Ah Kiat* [1966] 1 MLJ 9 at p 11 (H–I) per Raja Azlan Shah J (as His Royal Highness then was).

[16] In the end the learned trial judge found PW4's evidence to be unshaken. Having considered the evidence of PW4 in the appeal record ourselves, we cannot find fault with her finding. Further, although as a matter of law PW4's evidence requires no corroboration, the learned trial judge found that PW4's evidence was corroborated by PW9's evidence. PW9, who arrived at the restaurant at about 7.50pm took up position therein and sat at a table with two members of the police strike team. Other members of the strike team were spread out close by in the vicinity of the restaurant. From her position in the restaurant she saw Nasaruddin and Azhar entering the restaurant together with PW4 and sat at a table. From her position which was about 7–8 feet from where PW4, Nasaruddin and Azhar sat, PW9 could see them talking while having their drink. At one stage of the meeting between PW4 and Nasaruddin and Azhar, PW9 saw PW4 opening his waist pouch and appeared to show something to Nasaruddin and Azhar. At about 8.10pm she saw Bob leaving the restaurant. About ten minutes later, PW9 saw PW4 and Azhar walk out of the restaurant and stopped at a spot by the side of Jalan Raja Alang which was in front of the restaurant. A few minutes later, she saw Bob coming back to the restaurant carrying a plastic bag in his hand and approached PW4 and Azhar. She saw Nasaruddin showing the plastic bag to PW4. PW9 then saw PW4 looking into the bag and rubbed his head which was the pre-arranged signal which SP9 was waiting for. PW9 and other members of the police strike team sprang into action and moved towards the spot where Nasaruddin, Azhar and PW4 were standing, and identified herself as a police officer. Nasaruddin and Azhar were momentarily stunned and then tried to escape. PW9 and PW4 managed to overpower Nasaruddin who was caught while still holding the plastic bag containing the proscribed drugs. Azhar also failed to make good his escape as he was arrested by other members of the police strike team. We are therefore in agreement with the learned trial judge that PW4's evidence was corroborated by PW9's evidence in material particulars.

[17] To prove the offence of trafficking, the prosecution could prove affirmatively that an accused was in possession of the proscribed drugs and then invoke the presumption of trafficking under s 37(da) of the DDA, or it could establish its case of trafficking by proving any of the acts of trafficking as defined under s 2 of the DDA. In *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560, the Federal Court said:

> Having regard to the evidence of this case, it is our view that the learned trial judge was unduly concerned with the exclusivity of possession of room 'K' and the custody and control of the cannabis in question in relation to Amran. *It is essential to bear in mind that the case of the prosecution was not based on custody or control thereby invoking the presumption of possession, or on possession of 200g or more cannabis thereby attracting the presumption of trafficking under s 37(d) or (da)(vi) of the Act. The prosecution founded its case of trafficking on the 'sale' of the cannabis to PW9, the agent provocateur.*

Section 2 of the Act defines 'trafficking' thus:

> 'trafficking' *includes* the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug;

Hence the definition of 'trafficking' in the Act is wide and includes not only buying and selling but also carrying, keeping and concealing. (Emphasis added.)

[18] After having undertaken a maximum evaluation of the evidence of PW4 and PW9, the learned trial judge concluded that the prosecution had established a prima case of trafficking against Nasaruddin and Azhar as defined under s 2 of the Act in furtherance of their common intention provided under s 34 of the Penal Code. This what she said:

> There was evidence before the court of OKT2 negotiating with SP4 and the transaction would have been completed had SP9 not appeared on the scene to intercept. OKT1 was present throughout and this was witnessed by SP9. It was OKT1 who was in direct physical possession of the P11 which contained the drugs. The conduct of OKT2 that he was in a position to 'sell' the ganja and effectively had the power to dispose of the ganja and was about to accept the money from SP4.

She eventually concluded:

> The ingredients of the offence was established on the basis of direct evidence which fulfilled the requirements of trafficking s 2 of the DDA 1952 in that OKT1 was carrying the drugs and together with OKT2 were in the course of giving the drugs to SP4. SP4 was in the course of handing over the money when he signalled to the police team that was in the immediate vicinity. OKT1 was very much in physical possession of the drugs. OKT2 was according to the evidence spear heading the transaction. He was the spokesman for the two and there was no suggestion whatsoever that he did not understand what the transaction was. The same could be said of OKT1 who stood up to fetch the bag of ganja.
>
> ...
>
> On the evidence as examined above and the law, it was found this was a case of entrapment in which there was direct evidence of OKT1 and OKT2 intending to sell ganja to SP4. Both OKT1 and OKT2 were found to be acting in concert. OKT1 could not be said to be in passive possession as he was 'carrying' for the purpose of delivery. It was found that the prosecution had established the ingredients of trafficking within the ambit of s 2 of the DDA 1952 without having to rely any presumption.

[19] We agree. As we have said at the commencement of this judgment, on the evidence available, Nasaruddin and Azhar were arrested by the police when they, in furtherance of their common intention, were delivering the proscribed

drugs to the agent provocateur (PW4) which PW4 had agreed to buy pursuant to a negotiation between them. Although the negotiation was done by Azhar, Nasaruddin was present in the negotiation. In fact he sat next to Azhar. Nasaruddin remained in the negotiation until PW4 showed the 'flash roll' to Azhar. When Azhar saw the money he nodded his head and then spoke to Nasaruddin, whereupon Nasaruddin got up and left the restaurant. Although PW4 did not understand the language spoken by Azhar to Nasaruddin, the inescapable inference is that the conversation must be about the 'daun' (cannabis) Azhar and PW4 was negotiating to transact. Immediately after Azhar spoke to Nasaruddin, Nasaruddin left the restaurant and then came back a few minutes later carrying the plastic bag (containing the proscribed drugs) and showing it to PW4. In our judgment, the conclusion which must be drawn from the totality of PW4's and PW9's evidence is that Nasaruddin was acting in concert with Azhar. They were trafficking in the proscribed drug pursuant to their common intention. The learned trial judge was right when she held that the prosecution had proved a prima facie case of trafficking against Nasaruddin and Azhar as per the charge against them.

[20] This brings us to the submission of learned counsel for Nasaruddin. The complaint here is that nowhere in the record of proceedings of the High Court (particularly pp 125–126 of the appeal record) was it shown that the learned trial judge had considered and made the finding that the prosecution had made out a prima facie case. It was also not recorded in the notes of the proceedings that she had ordered Nasaruddin to enter on his defence. It was therefore contended that the learned judge failed to comply with s 180 of the Criminal Procedure Code.

[21] Section 180 of the Criminal Procedure Code provides:

> (1) When the case for the prosecution is concluded, *the Court shall consider* whether the prosecution has made out a prima facie case against the accused.
>
> (2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.
>
> (4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[22] So, the crucial question is whether the learned trial judge considered whether the prosecution had made out a prima facie case against Nasaruddin

and Azhar? In our view the answer to this question must be in the affirmative. This is clear from the grounds of judgment of the learned trial judge. The consideration whether the prosecution had made out a prima facie was clearly in her mind when the prosecution case was concluded (see pp 153–192, 193 and 195 of the appeal record). Before ordering Nasaruddin and Azhar to enter on their defence (p 192 of the appeal record), she directed herself the right question in considering the issue of prima facie case. In her grounds of judgment she said (at pp 188–189):

> The decision in the case of *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 at p 81; [2003] 1 CLJ 734 at p 753 had once again postulated the essence of a 'prima facie' case.
>
> It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.

[23] We hold that the failure of the learned trial judge to record in the notes of the proceedings her finding that the prosecution had made out a prima facie case against Nasaruddin and Azhar, and her order calling upon them to enter on their defence was not fatal to the prosecution. There is nothing under s 180 of the CPC or any other statute which make it mandatory for the trial judge to record in the notes of the proceedings her finding that the prosecution had proved a prima facie case and her order calling upon them to enter on their defence (see *Yap Chai Chai & Anor v Public Prosecutor* [1973] 1 MLJ 219 at p 221 (FC); *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217 (SC) and *Public Prosecutor v Chan Wai Heng* [2008] 5 MLJ 798).

DEFENCE

[24] Nasaruddin and Azhar gave evidence under oath. They called no other witness.

[25] The substance of Nasaruddin's defence was that on 15 June 2001, he was on the way back from work and was walking along Jalan Raja Alang carrying a bag containing his clothes. Suddenly, the police, who was chasing someone in front of him, caught him from the rear and seized his bag. Nasaruddin claimed that on that day he was not with Azhar and Azhar was not his friend. He denied being in possession or having any knowledge of the plastic bag and the drugs in it.

[26] In his evidence, Azhar claimed that he was arrested as he was leaving the *surau* in the area of the Muetenah Rumah Makan Acheh 2, looking for food. He heard the shout 'polis' and he ran because he had no valid document when he entered Malaysia but was arrested by the police. He claimed that he did not know Nasaruddin at all. He denied talking to the latter at the restaurant. According to him he did not talk to anybody in the restaurant. He denied ownership and knowledge of the proscribed drugs.

[27] The learned trial judge found that the evidence of Nasaruddin and Azhar were directly opposed to the version of the prosecution established by PW4 and PW9's evidence. She found that the gist of the Nasaruddin and Azhar's defence is as follows:

(1) both OKT1 and OKT2 did not know one another until after they were both apprehended. A version was also given that they were only acquainted after having been charged in a lower court for illegal entry;

(2) both did not know what they were arrested for;

(3) both had no knowledge of the existence of the cannabis nor were they engaged in any transaction;

(4) the arrest was a mistake; and

(5) OKT2 said he ran because being an illegal he was afraid of the police.

[28] The learned trial judge considered the defence of Nasaruddin and Azhar and evaluated them in the light of the evidence adduced by the prosecution which she found to have established a prima facie case. She found the defence of both of them to be generally one of denial. This is what she said:

> There was no burden emplaced on the defence to produce witnesses. But in response to various questions posed by the prosecution OKT2 also gave simple denials as to his connection with the *ganja* that was being carried by OKT1. Overall, the suggestion of defence was that:
>
> (i) With respect to OKT1, being an illegal who by his own evidence was supposed to be employed somewhere in Bangsar, he was 'framed' in an operation where the police use illegals to blame for trafficking.
>
> (ii) With respect OKT2, since he was an illegal and taking shelter in a *surau* for three days it was untenable that he would be engaged in trafficking. The gist again was that illegal are swooped upon and 'picked' for purposes of being charged for trafficking. The crux of contention was also that the police and the enforcement agencies are arbitrary and untrustworthy. The entrapment was for a frame-up or also for taking money from the illegal immigrants. Also suggested was that informers are not to be trusted because their objective is to obtain payment.

The inherent incredibility of the defence failed to rebut the prosecution's case. At the end of the defence it was found that the prosecution had established a case beyond reasonable doubt and OKT1 and OKT2 were found guilty of the charge preferred against them.

[29] That conclusion of the learned trial judge was based on findings of facts which in turn depends on her finding on the credibility or otherwise of the prosecution witnesses particularly, PW4 and PW9 on the one hand, and of Nasaruddin and Azhar on the other, in respect of which findings this court is reluctant to interfere (see *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644; *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 273). We find no misdirection or appealable error on the part of the learned trial judge. Having carefully scrutinised the evidence on record and having carefully examined the judgment of the learned trial judge, we are satisfied that the conviction and sentences on Nasaruddin and Azhar are safe. In the result their appeals are dismissed and the conviction and sentences imposed on them by the High Court are affirmed.

First appellant's application and both appeals dismissed.

Reported by Andrew Christopher Simon